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MEMO

To: Alpine School District Ad Hoc Committee Members

From: Robert J. Moore, Deputy Utah County Attorney

Date: June 23, 2004

Re: *Questions Posed by Committee Members Regarding Division of Assets and Liabilities, Etc.*

I am writing this Memo at the Committee's request to be included in the final report and recommendation presented to the Utah County Commission on June 29, 2004. The substance of this Memo will attempt to respond to a number of questions posed by Committee Members.

Please be advised from the outset that the process of creating a new school district by a county legislative body as outlined in Utah Code Ann. § 53A-2-118 is a new process to the state of Utah. H.B. 169 (2003) which enacted Utah Code Ann. §§ 53A-2-117 through 53A-2-122 does not adequately address (intentionally or not) all of the issues before the Committee. Further, H.B. 169 (2003) contains a number of ambiguities and undefined terms as demonstrated below. Finally, some of the questions posed below may only be sufficiently answered after a new school board is created and responds to some of the questions posed. In any event, litigation may be necessary to sufficiently answer some of the questions posed below.

QUESTIONS POSED

Please note that I have rephrased the questions as originally present.

1. What does the phrase "property which the new district is entitled to receive" contained in Utah Code Ann. § 53A-2-120 mean? Does this phrase encompass all property, both tangible and intangible?
2. What is the legal definition of the phrase "intangible property" as contained in Utah Code Ann. § 53A-2-120?
3. What does the phrase "other indebtedness" contained in Utah Code Ann. § 53A-2-121 mean? Does this phrase include all liabilities?

4. What if the boards of the existing and new districts can not agree as to the relative share of assets and liabilities, as required by Utah Code Ann. § 53A-2-121?
5. What happens to the employees currently assigned to schools in the proposed new school district if the new school district is approved?
6. What is the legal definition of the phrase “leave benefit” as contained in Utah Code Ann. § 53A-2-116? Does this phrase include sick, compensatory, personal, vacation and other forms of leave?
7. Is the proposed new school district required to adopt the policies, agreements and procedures of the existing school district? If not, what protections are afforded employees staff after the one-year protections in Utah Code Ann. § 53A-2-116, other than seniority and tenure?

ANSWERS

In answering the questions posed, there are general rules for interpreting statutes, usually referred to as statutory construction. Courts in Utah have long held that “when interpreting statutes, our primary goal is to evince the true intent and purpose of the Legislature.” *Lovendahl v. Jordan Sch. Dist.*, 2002 UT 130, ¶ 20 (citations omitted). “When interpreting statutes, we determine the statute's meaning by first looking to the statute's plain language, and give effect to the plain language unless the language is ambiguous.” *Id.* at ¶ 21 (citations omitted). “Where the language of a statute is ambiguous, we may look to the statutory scheme to divine legislative intent.” *Id.* (citations omitted). “In construing a statute, [we] must assume that each term in the statute was used advisedly; thus the statutory words are read literally, unless such a reading is unreasonably confused or inoperable.” *Id.* at ¶ 24 (citations omitted). In short, our principal goal is to give effect to the intent of the Legislature. *See id.*

Some of the answers to the questions posed above can be gleaned from looking at the plain language of the applicable statutes underlying the questions posed, together with looking at the statutory scheme and finally looking to other statutes for guidance. I will address each question posed in turn below:

With respect to the first question posed, the phrase “property which the new district is entitled to receive” as found in Utah Code Ann. § 53A-2-120(1) by itself is an ambiguous phrase. However to put that phrase in context, Utah Code Ann. § 53A-2-120(1) states that “. . . the board of the existing district shall convey and deliver to the board of the new district *all school property* which the new district is entitled to receive.” (emphasis added). The phrase “all school property” is clearly broad enough to include real property, personal property, and tangible and intangible property. Although the phrase “property which the new district is entitled to receive” may be ambiguous by itself, but read in conjunction with the preceding phrase evidences an intent by the Legislature to give the new district its proportionate share of all school property.

Further, Utah Code Ann. § 53A-2-120(4) declares that “the intangible property of the existing

school district shall be prorated between it and the new district. . . .” This specific reference to intangible property in the same statute as the phrase “all school property which the new district is entitled to receive” further solidifies the point that all school property as found in Utah Code Ann. § 53A-2-120(1) is broad enough to include real property, personal property, and tangible and intangible property.

With respect to the second question posed, the term “intangible property” as found in Utah Code Ann. § 53A-2-120 is an ambiguous and undefined term. However, we can look to other statutes for guidance. In Utah Code Ann. § 59-2-102(17) “intangible property” has been defined as follows:

- (a) means property that is capable of private ownership separate from tangible property; and
- (b) includes:
 - (i) moneys;
 - (ii) credits;
 - (iii) bonds;
 - (iv) stocks;
 - (v) representative property;
 - (vi) franchises;
 - (vii) licenses;
 - (viii) trade names;
 - (ix) copyrights; and
 - (x) patents.

The above definition is found in the Property Tax Act. Still another definition of “intangible property” is found in Utah Code Ann. § 67-4a-102(14), which reads as follows:

- (a) "Intangible property" includes:
 - (i) monies, checks, drafts, deposits in a financial institution, interest, dividends, and income;
 - (ii) credit balances, customer overpayments, gift certificates over \$25, security deposits, refunds, credit memos, unpaid wages, unused airline tickets, and unidentified remittances;
 - (iii) stocks, mutual funds, and other intangible ownership interests in business associations;
 - (iv) monies deposited to redeem stocks, bonds, coupons, and other securities or to make distributions;
 - (v) bonds, notes, and any other debt obligations;
 - (vi) amounts due and payable under the terms of insurance policies;
 - (vii) amounts distributable from a trust or custodial fund established under a plan to provide health, welfare, pension, vacation, severance, retirement, death, stock purchase, profit sharing, employee savings, supplemental unemployment insurance or similar benefits; and
 - (viii) amounts distributable from a mineral interest in land.

(b) "Intangible property" does not include patronage capital of electric, telephone, and agricultural cooperatives.

The above definition is found in the Unclaimed Property Act. Since, "intangible property" is an undefined term, courts may look to the above definitions to give it guidance in defining "intangible property." In this case, courts are likely to define "intangible property" liberally to effectuate the legislative intent of dividing all school property.

With respect to the third question posed, the phrase "other indebtedness" as found in Utah Code Ann. § 53A-2-121 is somewhat ambiguous and is presumably a catchall phrase. The catchall phrase "other indebtedness" is broad enough to include all liabilities of the existing school district. Therefore, the proposed new school district would take their proportionate share of all of the liabilities of the existing school district. This view is consistent with the intent of the Legislature that all assets and liabilities are pro rata distributed between the existing school district and the new school district. Again, courts are likely to define the catchall phrase "other indebtedness" liberally to effectuate the legislative intent of pro rata distribution of all assets and liabilities.

With respect to the fourth question posed, Utah Code Ann. § 53A-2-120(1)(b) states that "any disagreements as to the disposition of school property shall be resolved by the county legislative body." The Utah County Commission (also known as the county legislative body) would resolve any disagreements as to pro rata distribution of assets and liabilities. This exact question was raised during the Senate Floor debate and the answer was that the county legislative body is to be the arbitrator between the new school district and the existing school district if the districts cannot agree as to the disposition of school property. The use of the word "arbitrator" during the Senate Floor debate suggests an intent on the part of the Legislature that the decision of the County Commission be binding on both the new school district and the existing school district as to disposition of school property.

With respect to the fifth question posed, this is the most difficult question to answer and probably the question that will result in litigation. Utah Code Ann. §§ 53A-2-122 and 53A-2-116 provide some protections to those employees who are transferred to the new school district. These protections include retention of the same status as a career or provisional employee with accrued seniority, salary protection for the first year, credit for all accumulated leave and tenure recognized by the district from which the employee transferred, and either a reasonably corresponding leave benefit or compensation for that leave benefit as would have been done if the employee had retired. *See id.*

The underlying question to the fifth question posed is if the employees currently assigned to schools within the boundaries of the new district are transferred to the new district upon its creation? With respect to this question, H.B. 169 (2003) has not sufficiently answered it (intentionally or not). There are at least three ways to deal with this question. First and probably the best option, is if the boards of the new district and the existing district (probably in consultation with the employee's association or at least the employees) can reach an agreement as to the transfer of employees to the new school district. To avoid litigation the new

school district could grandfather all teachers that are transferred into it. The new school district could then enact entirely its own salary and benefits scale with respect to all newly hired employees. Then, over time the grandfathered transferred employees would be phased out.

A second option is if the new district takes the position that a proportionate share of the employee's contracts would transfer to the new school district because the contracts are property of the existing school district. Presumably, the new school district would seek those employees which are currently assigned to schools within its boundaries. This position would be predicated on the term "school property" as found in Utah Code Ann. § 53A-2-120 which could include the existing school district contracts. Most teachers and other employees have an employment contract with the existing school district. The new school district could argue that, absent a non transferrable clause or a collective bargaining agreement to the contrary, a proportionate share of those employment contracts would be transferred to the new school district.

Furthermore, Utah Code Ann. § 53A-2-120(3) states that "the new school board may bring and maintains actions to recover, protect, and preserve property and rights of the district's schools and *to enforce contracts*. (emphasis added). The new school district could use this statute to compel the pro rata distribution of employment contracts and to enforce the same. I would characterize this option as a rather aggressive option if exercised by a new school district, one which I am not convinced that the Legislature intended or a court would uphold it.

Still another option is reduction in force by the existing school district. To explain further, the existing school district would bring all of the employees back in and a reduction in force would take place in accordance with the existing school district's policy and procedures. Presumably, there would be "bumping" rights for employees with more seniority. The probable net effect to the existing school district of the reduction in force would be that it would retain those employees with the most seniority, salary, and benefits. While those employees which are bumped by more senior employees would be available to be transferred or hired by the new school district. The probably net effect to the new school district of the reduction in force would be that it would receive those employees with less seniority, salary, and benefits. I am not convinced that the Legislature intended this option either. Rather, I believe that the Legislature intended that the employees assigned to the schools which are transferred to a new school district would readily follow those schools into the new school district without much trouble.

With respect to the sixth question, the term "leave benefit" as found in Utah Code Ann. § 53A-2-116 is another ambiguous and undefined term. However, the term "leave benefit" is clearly broad enough to include all forms of leave, such as vacation, sick, annual, other forms of leave. Pursuant to Utah Code Ann § 53A-2-116(2)-(3), the district to which an employee is transferred would compare its leave benefits (usually from the benefit section of the employee's manual or contract) to the employee's former districts leave benefit (again usually from the benefit section of the employee's manual or contract). If the leave benefit of the district to which an employee is transferred does not reasonably correspond to the leave benefit of the employee's former district, then the district to which an employee is transferred shall compensate the employee for the benefit.

As a result, a comparison of the existing school district's leave benefits and the new school district's leave benefits would be warranted. In any event, courts are likely to define "leave benefit" liberally to effectuate the legislative intent of protecting the rights of transferred employees.

With respect to the seventh question posed, a new school district would take its proportionate share of all school property and liabilities as discussed previously. Presumably and absent a non transferrable clause, a new school district would be subject to the contracts of the existing school district. This position is support by Utah Code Ann. § 53A-2-120(3) which allows a new school board to "recover, protect, and preserve the property and rights of the district's schools and to enforce contracts."

However, the existing school district's policies and procedures are not necessarily transferrable to the new school district. Furthermore, the new school district would be under no obligation to adopt the policies and procedures of the existing school district. As mentioned previously there are some protections afforded to those employees who transfer to a new school district, such as those employees are guaranteed at least the same salary for the first year, all accumulated leave and tenure, and a leave benefit which reasonably corresponds to the employee's former district (or to be compensated). Also, employees who are transferred to a new district retain the same status as a career or provisional employee with accrued seniority pursuant to Utah Code Ann. § 53A-2-122. Other protections afforded employees who transfer to a new school district include those protections by law, such as the Fair Labor Standards Act, Family Medical Leave Act, etc.

CONCLUSION

It should be readily apparent that there are not definitive answers to some of the questions posed above. As a result, the creation of a new school district from an existing school district can be best characterized as a divorce and probably a messy one in that. There exists a real chance for litigation to answer some of the questions posed above and later questions posed. Finally, there are probably other answers to the questions posed together with other options available. However, I am hopefully that this Memo has provided you some insight to resolving the issues before you, but please be advised that this Memo has no binding effect on the Committee, the County Commission, the existing school district, or the new school district.

Thank you for your attention to this matter.